In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
ALBERT C. ENGARD. } No. 136.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On the 11th day of February, 1897, the claimant, Albert C. Engard, was a chief engineer in the United States Navy, performing duty on a United States receiving ship at League Island, Pa., receiving sea pay therefor. On said date an order was issued by the Secretary of the Navy directing claimant to report by letter to the Steel Inspection Board, Washington, D. C., for temporary duty in connection with the inspection of certain steel tubes at Findlay and at Shelby, Ohio. The order contained the following: "This duty is in addition to your present duties." (See record, p. 3.) In accordance with the order the claimant made two

round trips between League Island, Pa., and Shelby, Ohio. On the first trip he left League Island February 24 and returned April 27. On the second trip he left League Island June 15 and returned August 14, the total time engaged in said duty of inspection being one hundred and twenty-two days. (Record, p. 3.)

The claimant made application for mileage amounting to $172.80, which claim was allowed by the accounting officers, but they contended that for the one hundred and twenty-two days consumed by the claimant in inspecting steel, he was entitled to "shore duty pay" only, and deducted from the claim for mileage the difference between "shore duty pay" and "sea pay" for said time, the sum of $133.70, paying to claimant $39.10. He brought this action to recover the remainder, $133.70. (Record, pp. 3 and 4.)

The case was heard by the Court of Claims, and upon the findings of fact set forth in the record (pp. 3 and 4) the court found, as a conclusion of law, that "Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of one hundred and thirty-three dollars and seventy cents ($133.70)." The court thereupon ordered judgment to be entered in said amount.

From the judgment so entered the United States takes this appeal.

ASSIGNMENT OF ERRORS.

1. The court erred in its conclusion of law.

2. The court erred in rendering judgment for claimant.

ARGUMENT.

Section 1571, Revised Statutes, provides as follows:

> No service shall be regarded as sea service except such as shall be performed at sea under the orders of a Department, or in vessels employed by authority of law.

In seeking to interpret this statute there have been a number of cases before the courts for the purpose of determining when a naval officer should receive "shore-duty pay" and when "sea pay," where his duties are of a mixed character, partly shore and partly sea duty, and many complicated and intricate questions have thus arisen, dependent upon the facts and circumstances surrounding each individual case. As a result of this litigation at least two general principles have been formulated: First, that the pay of a naval officer is not determined by the nature of the order assigning him to duty, but, on the other hand, is determined by the nature of the duties actually performed by the officer. Second, that where the services performed are partly sea duty and partly shore duty, the *paramount* duty should determine the pay where it is possible to segregate the time spent in sea service from the time spent on shore duty. As a corollary, it may be said that an order from the Secretary of the Navy may have the effect of relieving an officer from either shore duty or sea duty, notwithstanding the fact that the order does not do so *eo nomine*.

PAY NOT DETERMINED BY THE ORDER.

In the case of *Symonds* v. *The United States* (21 C Cls. R., p. 148) the Secretary of the Navy decided that the officers of the *New Hampshire* would be considered as attached to a vessel commissioned for sea service, and on July 7, 1882, an order was issued by the Secretary of the Navy that "on and after the 1st of August next the *New Hampshire* will *not* be considered in commission for sea service." Symonds brought his suit in the Court of Claims for sea pay, and the court held that he was entitled to such pay, in the following language:

> The legal essence of things can not be changed by a mere name—by the volition of an executive officer in charge of executive duty.

The court further held that when the officer was ordered by the Department on board the ship *New Hampshire* to perform duties, he became "at sea," and was in the performance of duties at sea within the meaning of section 1571; that his right of sea pay attached under section 1556, Revised Statutes; and that it was beyond the power of the Secretary to change this as long as the elements of sea service continued as marked by the character of the duties. The case was appealed by the United States to this court, and the judgment of the court below affirmed. (120 U. S., 46.) In the opinion Mr. Justice Harlan propounds the following inquiry:

> Does the statute confer upon the Secretary of the Navy, acting alone or by direction of the

> President, the power to declare a particular service to be shore service if in fact it was performed by the officer when "at sea" under the orders of the Department and on a vessel employed with authority of law?

and answers the inquiry as follows:

> But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. (Case cited, p. 49.)

The foregoing doctrine was reaffirmed by this court in *United States* v. *Bishop* (120 U. S., 51), *United States* v. *Strong* (125 U. S., 656), and *United States* v. *Barnette* (165 U. S., 174), and followed by the Court of Claims in *McRitchie* v. *United States* (23 C. Cls. R., 23), and *Aulick's case* (27 C. Cls. R., 109).

In the case of Barnette, Mr. Justice Gray, speaking for the court, says (p. 179):

> The fact that this service was called, in the order of the Secretary of the Navy assigning him to duty upon this vessel, "employment on

> shore duty," is immaterial. The material question is whether the service was in fact performed at sea and not on shore, and not upon the name by which the Secretary of the Navy was pleased to designate it.

Also see *Pierce* v. *United States* (33 C. Cls. R., 294); *Wyckoff* v. *United States* (34 C. Cls. R., 288).

In the last-mentioned case the court used the following language:

> The right to pay for a sea service attached when that kind of service began, and this right continued as long as the service continued, independent of the order of the Secretary of the Navy by which the service on board the ship was declared to be merely additional to that on shore. * * *
>
> The rules of the service imposed upon the plaintiff duties incident to a ship at sea, and the substantial essence of the transaction, and not the mere name of it, must govern the amount of the pay. (See pp. 293 and 294 of case cited.)

In the *McGowan case* (36 C. Cls. R., p. 69) the court said:

> It has been held by this court, and in substance affirmed by the Supreme Court, that the Secretary of the Navy can not arbitrarily change and classify by an order the character of the duty to be performed, whether shore or sea duty.
>
> In the case of *Symonds* v. *United States* (21 C. Cls. R., 148) it is in substance said that the Secretary of the Navy can not change the char-

> acter of an officer's service from sea service to shore service by simply ordering that it be so regarded. The Supreme Court affirmed that view of the law both as to the Strong and Symonds case. * * * We cite these cases for the purpose of showing that the mere designation of the Secretary as shore duty will not have the legal effect of changing the quality of the service.

See also *Hannum* v. *United States* (36 C. Cls. R., 99). In the case of *Taussig* v. *United States* (38 C. Cls. R., 112) the court said:

> That is to say, from the law as embodied in section 1571, as construed by the Supreme Court and this court in the cases cited to which we have referred, and not from the regulation, the court must determine whether the service is or is not sea service. The Secretary of the Navy has not the power to declare sea service to be shore service, nor has he the power to declare shore service to be sea service.

PARAMOUNT DUTY SHOULD DETERMINE PAY.

On the second proposition, namely, that where the services performed are partly sea duty and partly shore duty, the *paramount* duty should determine the pay when it is possible to segregate the time spent in sea service from the time spent on shore duty, we cite:

In the *McGowan case, supra* (p. 68), the court found that—

> It is not practicable to segregate the time spent in actual duty on shipboard from that spent in the performance of whatever duties

were required of him on shore, as he was called on day and night to supervise matters on board ship, in the barracks, and on the island.

Again (p. 69) the court said:

> The disallowance of the claim by the Department was upon the theory that the paramount duty of the claimant was on land and not on the sea or ship. The claimant did perform some service at sea in a ship under orders of the Department and in a vessel employed by authority of law; but if the service which he performed on land in the barracks and the service on the ship is to be regarded as a unit of service, can it be said that he was in the discharge of sea duty in derogation of the order of the Secretary designating it as shore duty?

On page 70 the court said:

> The order of the Secretary assigning him to duty in the command of the ship and the training station and the evidence clearly show that the training station had incident to it the paramount performance of the duty as the result of the conditions existing at the place to which he was assigned.

In the case of *Wyckoff* v. *United States* (34 C. Cls. R., 293) the court gave a judgment for the claimant where the facts showed a mixture of shore and sea service, upon the ground that the shore service was the incident and not the paramount duty. When the duty partakes of the character of sea service and shore duty, the fact of each particular case must be considered; and if from the whole case there is a preponderance

> in favor of either service, the service having the paramount character must constitute the basis on which to predicate the right of payment.

In the McGowan case the court dismissed claimant's petition.

In the case of *Taussig* v. *United States* (38 C. Cls. R., p. 104) the court said:

> The claimant's duties as hydrographic inspector were, as set forth in said finding, of far more importance than his duties as commanding officer of the vessel.

And by reason of the fact that the court found his shore duty paramount to his sea service, the court dismissed his petition.

While it is true that the claimant here was attached to the U. S. S. *Richmond*, and that the order provided that his inspection of steel was in addition to his duties, yet we contend that this order for the inspection of steel clearly had the effect for the time being of detaching him from duty on the *Richmond*, as from the very nature of his duties as inspector of steel it was impossible for him to perform any service whatever upon the ship.

In the opinion of the court we find the following language:

> It is manifest that the chief engineer of a great ship of war like the *Richmond* has many duties and responsibilities besides appearing on the deck in uniform—such as making reports, ordering supplies, carrying on correspondence, preparing against accidents to his machinery,

> supervising the work and discipline and accounts of his subordinates. The *Richmond* continued to lie at the League Island Navy Yard while the chief engineer went to Shelby, Ohio, to inspect boiler tubes; but he, and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin. His service in inspecting boiler tubes was, *per se*, shore duty; but his service on the *Richmond* at the same time was sea service, and the one was "temporary" and the other permanent. (Rec., p. 5.)

We find nothing in the record indicating that claimant had duties to perform on the *Richmond* during the time he was performing inspection duty, nor any responsibilities in relation thereto. Neither do we find anything which justifies the statement that the claimant, "and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin." This may or may not be true, but there is nothing in the record to show whether it is or not, and if it were a fact, it in no wise weakens the principle for which we contend in this case. The findings show a clear, distinct period of time of one hundred and twenty-two days during which claimant could not possibly have performed sea service, and this period is segregated and set apart from any possible sea duty, and we therefore contend that the case falls within the decisions that the paramount duty must determine the pay.

The *Richmond* is not "a great ship of war," as denominated by the Chief Justice in his opinion, but

on the other hand, it will be seen by consulting any register of the Navy that the *Richmond* is classed as a receiving ship with but 2,700 tons displacement. In the Naval Register of January 1, 1904, the *Richmond* is not given among either the first, second, third, or fourth rate vessels, neither does she rise to the dignity of a tugboat or sailing ship, but is placed in the class of receiving ships, which is the very lowest rate vessel in commission.

It is probable that the duties devolving upon an engineer on such a vessel as the *Richmond*, tied up at the harbor and doing duty as a receiving ship, could be performed by some inferior officer as an assistant engineer, especially in view of the fact that all great vessels have assistant engineers that perform the duties of the chief engineer, in the absence of that officer even when the vessel is in active service.

The record does show, inferentially, that this receiving ship remained at League Island, Pa., during the absence of claimant, and from the general nature of the duties of a receiving ship it must be inferred that the machinery was not required to be in condition to keep up steam any time during this period. The total length of time the *Richmond* was at League Island, Pa., is not shown in the record, but certainly the duties of the engineer on the vessel would be of the most elementary nature and could be performed by any subordinate. As a matter of fact, those duties, whatever they were, were performed by some one other than this claimant for the reason that he was not there.

If the claimant made any reports, ordered any supplies, carried on any correspondence, made any preparation against accidents to his machinery, or supervised the work and discipline of his subordinates during the one hundred and twenty-two days when he was in Ohio inspecting steel, there is nothing in the record to show the same and we do not know from what source the court below derived the information that would lead to any such inference.

Assuming, for the sake of this argument, that claimant was not relieved from his duty on the ship, yet it can not be denied that for this period of one hundred and twenty-two days his shore duty was clearly *paramount* to his sea duty. During the claimant's absence from the ship he was in the actual performance of duties entirely incompatible with sea service—duties that have always been recognized as shore service—and the effect of the order was to temporarily detach him from sea service and place him on shore duty. No *ipse dixit* of the Secretary of the Navy could make the service performed during these one hundred and twenty-two days' sea service, and no kind of declaration can change the shore service performed by claimant into sea duty. The mere fact that the order did not contain express words temporarily detaching him from sea service during the time that he was performing the shore service does not change the character and nature of the shore service into sea service. In the dissenting opinion, Judge Wright said:

> The services for which the claimant seeks a recovery in this case were not performed at sea,

nor in any vessel, but were performed at places far inland.

It is immaterial that the order giving shore duty designated the same as temporary and in addition to sea duty, for such services were inconsistent; the one could not be performed while in discharge of the other. Besides, the officer assigning to shore duty was not empowered to supersede the authority of the statute, and if by his order he assumed to do so, his act was a nullity and without force or effect. If the reasoning of the opinion of the majority of the court can be given effect to avoid the sanction of the statute in the present case, it is not an impossibility to evade its provisions in every case where it may be desirable to put an officer on shore duty with sea pay; and thus the will of Congress may be wholly frustrated and the authority of its enactments frittered away. (Rec., p. 6.)

In the case of *Schoonmaker* v. *United States* (19 C. Cls. R., 170) the claimant was a commander in the United States Navy and was ordered by the Secretary of the Navy to report to the Secretary of the Treasury for duty as light-house inspector. He was on duty as light-house inspector from January 1, 1875, until November 15, 1878, a period of nearly four years. Between July, 1877, and July, 1878, he was aboard a steamer provided by the Government exclusively for light-house service, and while on board of this steamer was engaged in the work of inspecting light-houses, beacons, etc. The period for which he was on board was one hundred and eight days, but the court held

that to be entitled to sea pay he must be afloat and under orders to perform sea service, and did not consider such duty as sea service.

In the case of Wyckoff, *supra*, the claimant was in command of a naval station, under an order which designated it as shore duty, and doing shore duty and receiving shore pay. While in the performance of such shore duty and in receiving shore pay, he received the following order: "In addition to your present duties, you will assume command of the U. S. S. *Nipsic*." The officer continued to perform both duties, but was allowed by the accounting officers shore pay only. He brought suit for full sea pay during the time he was performing both duties. The court gave judgment for the amount of claimant's demand, and held:

> The right to pay for a sea service attached when that kind of service began, and this right continued as long as the service continued, independent of the order of the Secretary of the Navy by which the service on board the ship was declared to be merely additional to that on shore.

In the case at bar the situation is exactly reversed. Here the officer was drawing sea pay while doing service on the *Richmond* under an order which entitled him to sea pay. He received orders commanding him to do additional duties, exactly as in the case of Wyckoff, but those additional duties, instead of being sea service, were shore service, and, just as the original order in the Wyckoff case, did not operate to prevent the change from "shore pay" to "sea pay" when he

performed actual sea service, so in this case the order assigning the claimant to additional duties could not continue him on sea pay for the one hundred and twenty-two days spent in inspecting steel, which is clearly shore service, no matter how the order was worded.

It is respectfully insisted that the decision of the Court of Claims in this case was erroneous and should be reversed.

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